In the Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-1473

WILBUR DEAN, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The court of appeals affirmed the judgment of the district court without opinion (Pet. App. A1). The findings and order of the district court (Pet. App. A20-A21) were entered without opinion and are not officially reported.

On the prior appeal, the opinions of the court of appeals affirming a judgment of forfeiture (Pet. App. A2-A14) and denying rehearing (Pet. App. A15-A17)

are reported at 392 F. 2d 672 and 397 F. 2d 782, respectively. This Court's order granting a petition for writ of certiorari, vacating the judgment and remanding the case for further consideration (Pet. App. A18) is reported at 401 U.S. 715.

JURISDICTION

The judgment of the court of appeals was entered on February 16, 1972 (Pet. App. A1). The petition for a writ of certiorari was filed on May 11, 1972. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether, after forfeiture proceedings were vacated and dismissed, the district court erred in directing that currency in the possession of the United States Marshal be surrendered to the Internal Revenue Service pursuant to a tax levy on the Marshal in 1971 for income and wagering excise taxes assessed against petitioners in 1965, 1966 and 1967, when the currency had been seized from petitioners in 1965 in the execution of search warrants issued on probable cause to believe that petitioners were engaged in wagering without having paid the special occupational tax required by 26 U.S.C. 4411.

STATUTES INVOLVED

The Internal Revenue Code of 1954 (26 U.S.C.) provides in pertinent part:

SEC. 6332. SURRENDER OF PROPERTY SUBJECT TO LEVY.

(a) * * * any person in possession of (or obligated with respect to) property or rights to property subject to levy upon which a levy has been made shall, upon demand of the Secretary or his delegate, surrender such property or rights (or discharge such obligation) to the Secretary or his delegate, except such part of the property or rights as is, at the time of such demand, subject to an attachment or execution under any judicial process.

* * * *

SEC. 7421. PROHIBITION OF SUITS TO RESTRAIN ASSESSMENT OR COLLECTION.

(a) * * * no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court by any person, whether or not such person is the person against whom such tax was assessed.

* * * *

SEC. 7422. CIVIL ACTIONS FOR REFUND.

(a) * * * No suit or proceeding shall be maintained in any court for the recovery of any internal revenue tax alleged to have been erroneously or illegally assessed or collected, or of any penalty claimed to have been collected without authority, or of any sum alleged to have been excessive or in any manner wrongfully collected, until a claim for refund or credit has been duly filed with the Secretary or his delegate, according to the provisions of law in that regard, and the regulations of the Secretary or his delegate established in pursuance thereof.

STATEMENT

On April 5, 1965, certain automobiles and other chattels, and $305,633.26 in currency, were seized from petitioners' home in the execution of search warrants issued by a United States Commissioner (R. 31-39).[1] The district court (R. 29, 100) and the court of appeals (R. 80) held that the affidavits supporting these warrants (R. 40-59) established probable cause to believe that petitioners were carrying on the business of accepting wagers without having registered, or having paid a special occupational tax, in violation of Section 4411 of the Internal Revenue Code of 1954. An order of the district court that this property be forfeited to the United States (R. 74-75) was affirmed on appeal (Pet. App. A2-A14), but was vacated and remanded by this Court (Pet. App. A18) for reconsideration in the light of *United States* v. *U.S. Coin & Currency*, 401 U.S. 715.

On remand, the Government filed a motion (R. 90-91) in the district court to dismiss its libel complaint, and requested the district court to order the United States Marshal to deliver the currency to the Internal Revenue Service pursuant to a levy served by the Service on the Marshal on June 28, 1971, for unpaid taxes owed by petitioners in a total amount of $1,150,266.69, including statutory additions to tax.

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[1] "R." references are to the appendix in the court of appeals.

The notice of levy [2] indicates that it was issued on account of the following tax assessments:

Taxable Period	Date of assessment	Kind of tax	Amount of tax	Additions to tax
1961	3-25-66	income	9,877.24	$ 2,531.97
1962	3-25-66	income	57,754.28	15,559.16
1963	3-25-66	income	58,073.55	16,484.97
1964	8-31-65	income	52,586.99	18,340.03
1965	8-21-66	income	15,629.31	4,515.06
4-1-63 to 4-5-65	11-24-67	wagering	755,031.41	143,898.72
		lien fees	2.00	

The district court held that the levy was proper (R. 100) and directed the Marshal to give the currency to the Internal Revenue Service in partial payment of the tax assessments and liens and ordered all other seized property to be returned to petitioners (R. 100). The court of appeals affirmed without opinion (Pet. App. A1).

ARGUMENT

Petitioners' principal contention (Pet. 8-11) is that upon termination of the forfeiture proceeding the impounded currency was not subject to levy and should have been returned. However, the currency was properly subject to levy under the broad authority of 26 U.S.C. 6332. Property of a taxpayer which

[2] A copy of the notice of levy has been lodged with the Clerk of this Court. This document was furnished to the court of appeals and accepted by it as part of the record on appeal. In the district court, petitioners did not dispute the amounts of the assessments or the validity of the levy (Pet. App. A23-A27).

is held in official custody is subject to levy even if its original seizure was illegal. *Cancino* v. *United States*, 451 F. 2d 1028 (Ct. Cl.); *United States* v. *Freedman*, 444 F. 2d 1387 (C.A. 9); *Carlo* v. *United States*, 286 F. 2d 841 (C.A. 2), certiorari denied, 366 U.S. 944; *Field* v. *United States*, 263 F. 2d 758 (C.A. 5), certiorari denied, 360 U.S. 918; *Welsh* v. *United States*, 220 F. 2d 200 (C.A. D.C.). In any event, contrary to petitioners' argument (Pet. 5-8), the seizure here, which was made prior to this Court's decisions in *Marchetti* v. *United States*, 390 U.S. 39, and *Grosso* v. *United States*, 390 U.S. 62, pursuant to warrants issued on the basis of probable cause, was valid. See, *e.g.*, *Washington* v. *United States*, 402 F. 2d 3 (C.A. 4), certiorari denied, 402 U.S. 978; *United States* v. *Scaglione*, 446 F. 2d 182 (C.A. 5), certiorari denied, 404 U.S. 941.[3]

Petitioners' contention (Pet. 9) that the assessments constituting the basis for the levy might be erroneous is in substance a request for a declaratory judgment and injunctive relief, both of which are prohibited with respect to tax matters. 26 U.S.C. 7421 and 28 U.S.C. 2201.[4] Petitioners' proper rem-

[3] Petitioners' contention as to the validity of the seizure is based on *United States* v. *U. S. Coin and Currency*, 401 U.S. 715. That decision, however, did not hold the seizure of the property invalid but rather barred its subsequent forfeiture. That issue was mooted in this case by the dismissal of the forfeiture action (Pet. App. A20-A21).

[4] Petitioners' allusion (Pet. 9) to "counsel's vested interest" articulates no basis for a claim having priority over the tax liens in this case.

edy is the filing of a claim for refund of the currency which has been applied in payment of his tax liability. *Flora* v. *United States*, 362 U.S. 145.

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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